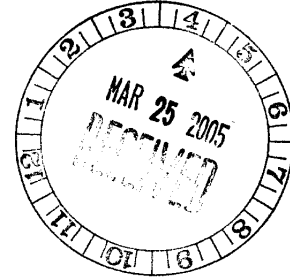


ORIGINAL

Before the  
SURFACE TRANSPORTATION BOARD



Finance Docket No. 34667

BNSF RAILWAY COMPANY-ACQUISITION  
AND OPERATION-STATE OF SOUTH DAKOTA

REPLY COMMENTS

ENTERED  
Office of Proceedings

MAR 25 2005

Part of  
Public Record

GORDON P. MacDOUGALL  
1025 Connecticut Ave., N.W.  
Washington DC 20036

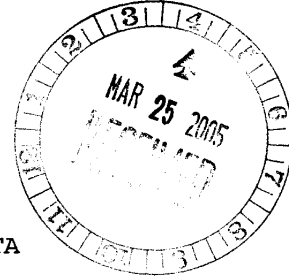
Attorney for John D. Fitzgerald

Due Date: March 25, 2005

Before the  
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34667

BNSF RAILWAY COMPANY-ACQUISITION  
AND OPERATION-STATE OF SOUTH DAKOTA



REPLY COMMENTS

John D. Fitzgerald,<sup>1/</sup> for and on behalf of United Transportation Union-General Committee of Adjustment (UTU/GO-386), submits these reply comments in response to the comments filed on or about March 11, 2005, by State of South Dakota. Mr. Fitzgerald filed his initial comments on March 11, 2005.<sup>2/</sup>

1. Public Convenience and Necessity. There is no claim that the application does not satisfy the "public convenience and necessity" standard of 49 U.S.C. §10901(c); there is no opposition of which we are aware.<sup>3/</sup>

<sup>1/</sup> General Chairman for United Transportation Union, with offices at 400 E. Evergreen Boulevard, Vancouver, WA 98660.

<sup>2/</sup> The initial comments erred in giving the Board's notice publication as 44 Fed. Reg. 11309-10 (Mar. 8, 2005). The correct citation is 70 Fed. Reg. 11309-10 (Mar. 8, 2005)..

<sup>3/</sup> Thus it is irrelevant that UTU/GO-386 (and other employee organizations) may disagree with the "negative" test for §10901(c) approval, stemming from a "presumption" by rulemaking after enactment of ICCTA, Class Exem. for the Construction of Connecting Track, 1 S.T.B. 75, 79 (1996), to a mere "benefit of the doubt" later on in F.D. No. 33407, Dakota, Minnesota & Eastern Railroad Corporation Construction into the Powder River Basin, 32-33 n. 81-82 (served Jan. 30, 2002). The "presumption," first applied in adjudication, Tongue River RR Co.-Const. & Oper.-Ashland-Decker, MT, 1 S.T.B. 809 (1996), is under review in No. 97-70037 (USCA-9th Cir.).

2. Conditions. The major issue in this proceeding involves the §10901(c) provision wherein the Board may impose conditions to its approval which the Board finds to be necessary in the public interest:

"Such certificate may approve the application as filed, or with modifications, and may require compliance with conditions (other than labor protection conditions) as the Board finds necessary in the public interest."

§10906(c) originally required a finding that the condition be "required" by the "public convenience and necessity," the same standard as for approval of the extension itself. 49 U.S.C. §1(20)(1920). The conditioning standard in 1976 was revised by the 4-R Act so that the condition is a lesser "necessary in the public interest." 49 U.S.C. 1(18)(b))(1976).<sup>4/</sup>

It is thus clear that however ICCTA in 1996 may have relaxed the §10901(c) standard of approval for a line extension (not inconsistent with the public convenience and necessity), the standard for imposing a condition to that approval has remained unchanged since 1976--it must be "necessary in the public interest."<sup>5/</sup>

A. South Dakota's Requested Conditions Are Extreme and Unwarranted. The State of South Dakota (SD) seeks extensive trackage rights and compulsory interchange, not only over trackage covered by the application, but also involving existing BNSF trackage, and on inactive trackage. SD seeks these operating

---

<sup>4/</sup> P.L. 94-210, §801. 90 Stat. 123-24 (Feb. 5, 1976).

<sup>5/</sup> Indeed, Congress in ICCTA also tightened up the conditioning power with respect to employee protection, removing the power of the STB to impose labor protection in extension cases.

conditions not for itself, but for four named, and other unnamed carriers. (SD Comments, 5-6).

There is no basis for imposing the conditions sought by SD. It must be emphasized that these conditions are not sought in a railroad consolidation proceeding under 49 U.S.C. §11323; rather, this is a traditional line extension case under §10901.

SD has not presented any of the information which would be required if it (or its four or more supporting carriers) would file in any application under the Board's regulations for line operations. 49 CFR 1150.1 et seq. Certainly SD's conditions cannot be granted without proof and strict Board necessary findings concerning the public interest under §10901(c).

SD argues that the "public interest" requirement is met by reference to four criteria of the rail transportation policy (RTP). (SD Comments, 13-14). SD is wrong in suggesting that the standard for granting line extension (trackage rights), as a condition for approval of BNSF's line extension, is met by four criteria of the RTP. SD is asking the Board to turn §10901 upside down, and allow SD to avoid the "public convenience and necessity" standard for operating authority for its four named and unnamed carriers.

The "public interest" provision governing conditions under §10901(c) cannot be elevated to be on a par with the "public convenience and necessary" standard governing approval of the extension in the first instance, for otherwise the condition would be meaningless and inconsistent with the standard for approval. Moreover, although the RTP is read into all provisions of the Interstate Commerce Act, and is the agency's guide to the public

interest, the "public interest" specified in a particular provision is not the equivalent of four criteria of the RTP.

The term "public interest" where it appears in a specific statutory provision, must be read in the context of that provision, and not confined to the RTP. This is also true for railroad consolidations, governed by a "public interest" standard (49 U.S.C. 11324).

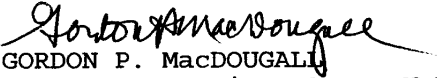
It is clear that the conditioning power of §10901(c) cannot substitute for the statute itself.

Our research since 1940 (when the former ICC acquired trackage rights authority) has uncovered only one reported case--that by an I.C.C. employee board--where the agency has imposed a trackage rights condition in a §10901 construction or extension proceeding. It was a situation where two competing carriers sought to extend their lines, by construction, into a shipper facility. The Finance Board conditioned construction approval for one carrier upon an option for the other, with the other carrier fully subject to the requirement for an appropriate application of its own. Georgia R. Construction and Operation, 320 I.C.C. 25, 35-37 (1963).

Clearly, there is no basis in the statute, or on this record, for the imposition of SD's conditions upon the BNSF transaction.

B. Effect Upon BNSF Employees. The imposition of SD's requested conditions would be adverse to BNSF employees. The reply verified statement (Appendix 3) of J.D. Fitzgerald is attached hereto, along with Appendix 4 from other BNSF employees.

Respectfully submitted,

  
GORDON P. MacDOUGALL  
1025 Connecticut Ave., N.W.  
Washington DC 20036

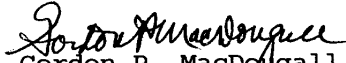
March 25, 2005

Attorney for John D. Fitzgerald

Certificate of Service

I hereby certify I have served a copy of the foregoing upon  
all parties of record by first class mail postage-prepaid.

Washington DC

  
Gordon P. MacDougall

F.D. No. 34667  
UTU/GO-386  
Appendix 3

REPLY VERIFIED STATEMENT  
OF JOHN D. FITZGERALD

My name is John D. Fitzgerald. I previously submitted a verified statement in this proceeding (Appendix 1), dated March 11, 2005.

I have read the comments and request for conditions of the State of South Dakota, filed March 14, 2005, along with additional statements, filed March 17, 2005, by Cities of Aberdeen and Mitchell, South Dakota Soybean Association, and Yaggie's, Inc. (Yankton, SD).

The South Dakota state legislative director for United Transportation Union (UTU) supports the BNSF Railway Company (BNSF) application, and also supports certain trackage rights for Dakota, Minnesota & Eastern Railroad Company (DM&E) over BNSF. I disagree with the imposition of DM&E trackage rights upon BNSF; however, the UTU is an open and democratic organization, with membership free to express differing viewpoints in proceedings such as this application case.

Attached as Appendix 4 are three statements that have been filed with the Board by three BNSF employees, but which heretofore have not been included in the official record. They are from Dan Bentz (Mar. 14), Drew Pearson (Mar. 17), and Eric Nelson (Mar. 17). They support the BNSF application without noting any reservations.

I am unaware of any opposition to the BNSF application. BNSF commenced operation of certain "core" lines in mid-1981. The other

carriers for which South Dakota seeks trackage rights came on the scene later, by spin-off from class 1 carriers or after abandonment, such as Dakota, Minnesota & Eastern Railroad (1986), Dakota, Missouri Valley & Western (1990), Dakota Southern Railway (1985), and D&I Railroad (1982). My information as to dates is taken from the AAR's Profiles (2003 ed.).

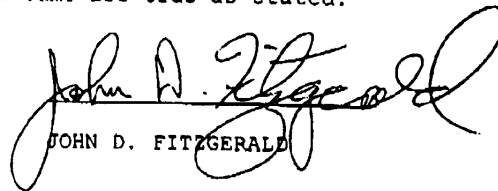
It is my understanding that the wages and benefits for employees of these other carriers are below those enjoyed by BNSF employees; and I am concerned that sharing of the BNSF lines with these other carriers may result in diminished BNSF traffic, adverse operating conditions, and/or pressure on BNSF employees for various concessions.



VERIFICATION

STATE OF WASHINGTON )  
COUNTY OF CLARK )

I have read the foregoing verified statement, know the contents thereof, and that the same are true as stated.

  
JOHN D. FITZGERALD

Dated at Vancouver, WA  
March 25, 2005

(Your Group or Name)  
(Address)

*Dan Bantz*  
*9 5th Ave. SW #8*

(Date)

*Abbeville, S.C.*  
*5/7/01*

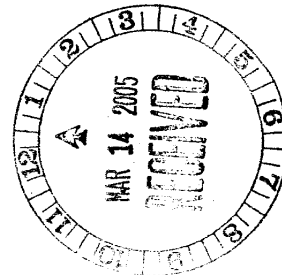
Surface Transportation Board  
1925 K Street NW  
Washington, DC 20423-0001

Re: Finance Docket No. 34667

Gentlemen:

I am a BNSF employee and write to support BNSF's petition to acquire by purchase the Core Line trackage and property as identified in the above Finance Docket.

Yours Truly,



Drew Pearson  
13639 Chevy Court  
Aberdeen, SD 57401

F.D. No. 34667  
UTW/GO-386  
Appendix 4  
Page 2 of 3

Correspondence



March 7, 2005

Surface Transportation Board  
1925 K Street NW  
Washington, DC 20423-0001

Re: Finance Docket No. 3466

Gentlemen:

I am a BNSF employee and write to support BNSF's petition to acquire by purchase the Core Line trackage and property as identified in the above Finance Docket.

Yours truly,

Drew Pearson

Eric Nelson  
1707 Marshall Road  
Aberdeen, S.D. 57401

March 8, 2005.  
Surface Transportation Board  
1925 K. Street NW  
Washington, DC 20423-0001

Re: Finance Docket No. 34667

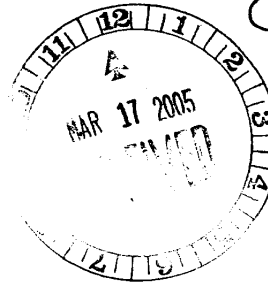
Gentlemen:

I am a BNSF employee and write to support BNSF's petition to acquire by purchase the Core Line trackage and property as identified in the above Finance Docket.

Yours Truly,

*Eric C. Nelson*

Eric C. Nelson



*Correspondence*

F.D. No. 34467  
UTU/GO-386  
Appendix 4  
Page 3 of 3